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Supreme Court of the United States.

OCTOBER TERM, 1928.

No. 91.

SAMUEL PRELA, trading as Selwell Blouse Company,
Petitioner,

vs.

LOUIS HUBSHMAN, Trustee in Bankruptcy of Samuel Prela, trading as Selwell Blouse Company,
Respondent.

REPLY BRIEF ON BEHALF OF SAMUEL PRELA, PETITIONER.

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—against—

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Respondent's brief is obviously not confined to issues involved in these proceedings. The questions raised herein are based on the refusal of the District Court to afford an opportunity to the petitioner to explain

1. His inability to comply with the turnover order.

2. That the respondent has failed to establish beyond a reasonable doubt the fact that the petitioner was concealing moneys and property of the bankrupt estate, and therefore should not be punished for contempt.

3. That there is a failure of proof to sustain the claim that the petitioner is presumably able to comply with the order to turn over the property.

A.

It will be noted that the cases cited in support of the second point of the respondent's brief, page 9, do not state the rule sought to be propounded by the respondent under this point, to wit: that the findings of the Referee affirmed by the District Court are conclusive on the reviewing Court.

On the contrary, the courts there say, that the reviewing Court should use care in disturbing the findings of the Referee unless there is evidence of a mistake and a miscarriage of justice.

One of petitioner's contentions is that the Referee erred in not permitting him to present all of his admissible evidence, and that, therefore, the Referee has insufficient facts before him to make a conclusive finding.

B.

The respondent's third point, raising the question of the degree of proof required in a turnover proceeding, is irrelevant and not in issue.

No part of the petitioner's case questions the degree of proof required in the original turnover motion. The issues raised by the petitioner are confined to the question of the degree of proof necessary in contempt proceedings.

Free v. *Shapiro*, 5 Fed. (2nd) 578 (C. C. A., 4th Cir.), cited by the respondent, approves the rule adopted by the Fourth Circuit and upon which petitioner bases his contention—at page 579 the Court says:

> "By the weight of authority, in attachment for contempt for failure to turn over assets adjudged

> to be withheld, the Court will not imprison the bankrupt unless satisfied beyond reasonable doubt of his guilt. The cases are cited in 7 Remington on Bankruptcy (3rd Ed.) 3041. So this Court held in *Kirsner* v. *Taliaferro*, 202 F. 51, 120 C. C. A. 305. This is but the application to contempt which results in imprisonment of that tender consideration for the liberty of the citizen expressed in the doctrine that a charge of crime must be proved beyond reasonable doubt."

And at page 580:

> "If the inquiry leads to the conclusion that he did have assets which were not turned over to the trustee, the order follows, requiring him to turn them over, and it is a final adjudication that he did improperly retain assets. But this is not inconsistent with the view that, in contempt proceedings, where the issue of imprisonment is involved, the Court may refuse to imprison because the evidence of present ability to pay is not convincing beyond a reasonable doubt."

C.

The cases cited in support of the fourth point of the respondent's brief, page 14, involve only whether the failure to comply with a turnover order constitutes a civil or criminal contempt.

These proceedings to punish for contempt have been held by many courts to be quasi criminal in their nature.

In re Cashman (D. C. N. Y.), 168 Fed. 1008, the Court said:

> "Proceedings for contempt being criminal in their nature, it is, of course, necessary for those alleging contempt to prove the commission thereof beyond a reasonable doubt."

To the same effect:

> *In re Switzer* (D. C. So. Car.), 140 Fed. 976;
> *Moody* v. *Cole* (*In re Annie Cole*) (D. C. N. Y.), 148 Fed. 295;
> *Skubinsky et al.* v. *Bodek*, 172 Fed. 340 (C. C. A. 3rd Cir.);
> *Stewart* v. *Reynolds*, 204 Fed. 709 (C. C. A., 5th Cir.).

The rule requiring proof beyond a reasonable doubt has been based upon other appropriate grounds. These are the seriousness of the consequences, and futility and injustice of depriving the individual of his liberty for failing to do the impossible and the inevitable loss of dignity that would result if the Court were compelled to retreat after it realized that imprisonment failed to enforce obedience.

These are the reasons which Judge Rose gave in *Kirsner* v. *Taliaferro* (cited in petitioner's brief, p. 8) (C. C. A.), 202 Fed. 51, for his statement that the conviction that the bankrupt had the power to comply "should be as nearly absolute as human conclusions ordinarily can be".

To the same effect:

> *In re Oriel*, 23 Fed. (2nd) 409, dissenting opinion of Judge Learned Hand.

In *Walnut Creek Milling Co. et al.* v. *Grain Products Co.* (D. C. La.), 21 Fed. (2nd) 381, the Court said:

> "I am persuaded that the weight of authority supports the view that the report of the Referee, who heard the witnesses, should be given great weight, when his findings of fact are being considered; that, since the bankrupt holds his property in trust to preserve it and turns it over to his trustee, it should be presumed that he will do so, if such property or assets are in his possession or control, upon an order to that effect being made; that the decision or adjudication that he did retain assets is final when made, but is not conclusive against him in any contempt proceeding looking to his imprisonment, if any should follow; that such an adjudication or decision that he did retain assets may be established by a preponderance of evidence; whereas proof beyond reasonable doubt would be required to sustain a criminal charge of concealment of assets or a proceeding for contempt of a quasi criminal character."

D

In reply to the respondent's fifth point, that the trustee had established a *prima facie* case by showing that a turnover order had been entered and the failure of the bankrupt to comply therewith, petitioner contends that upon an application to purge himself of contempt for his failure to comply with the turnover order he should have been allowed to submit evidence to show facts exonerating him which he had heretofore failed to do.

> *In re Weber*, 200 Fed. 404 (cited on p. 6 of petitioner's brief).

E.

The sixth point of the respondent (p. 21), that the turnover order was a conclusive estoppel against the bankrupt upon the date of its entry on the question of the bankrupt's possession of the property and money.

In the dissenting opinion in *Re Oriel* (*supra*), Learned Hand, *J.*, says:

> "Except for *Drakeford* v. *Adams*, 98 Ga. 722, 25 S. E. 833; *Reardon* v. *Pensoneau*, 18 F. (2nd) 244 (C. C. A. 8), and my own early decision, *In re Frankel* (D. C.) 184 F. 539, all the cases I can find so holding did not involve the ability of the contemnor to comply. That appears to me a crucial distinction, and it was so held in *Johnson* v. *Goldstein*, 11 F. (2nd) 702 (C. C. A. 6), though I am not clear that the case is strictly one of *res judicata*. In any event, we must not miss the forest for the trees; when exceptions are necessary, exceptions there should be."

Johnson et al. v. *Goldstein*, 11 Fed. (2nd) 702 (C. C. A. 6) (cited *supra*), presented a situation similar to the case at bar. Upon a petition of the trustee in bankruptcy, the Referee made an order directing the bankrupt to turn over the merchandise and or money to the extent of $10,591. Upon the bankrupt's petition to review, the District Judge modified the Referee's order, and on May 29, 1924, entered a similar order but fixed the amount at $8,000. On June 3, 1924, the trustee filed a petition to punish the bankrupt for contempt for not having complied with the turnover order of the District Judge. On June 9, 1924, the bankrupt filed his response, averring that he had no money or property to

pay the $8,000 or any part thereof, that no one held any money or property for his use or benefit, and that he had no means of obtaining such money or property. A petition was filed to revise the District Court's turnover order of May 29, 1924, and this was affirmed by the Circuit Court. On February 21, 1925, the trustee made a motion to imprison the bankrupt until he should purge himself of the contempt or turn over the $8,000. Pursuant thereto, the original petition of June 3, 1924, the response of June 9, 1924, and the last motion came on before the District Court, and on March 9, 1925, the response of the bankrupt was adjudged sufficient, the motion to commit overruled and the rule discharged.

A petition was then made by the trustee to revise the order of the District Court overruling the motion to imprison the bankrupt for contempt and discharging the rule to show cause. This petition was denied. Mack, *C. J.*, says, at page 703:

> "(2) The question presented on the former petition to revise, unlike that which an appeal in equity presents, was solely whether or not there was any substantial evidence to sustain the original turnover order, not whether the weight of evidence justified it. We held that there was sufficient evidence; we did not hold, as that question was not, and in that proceeding could not have been presented, that the evidence would not have justified a contrary finding by the Referee and District Judge. Our decision is binding, therefore, only as to the question presented. It follows that if, but for the proceedings in this Court, the District Court could have set aside its turnover order, or in the contempt proceedings have disregarded the findings on which the order

was based, its power so to do remained unaffected by the petition to revise and our affirmance thereon.

(3) The apparently contradictory findings can be explained on an interpretation that Judge Dawson disagreed with the Referee and Judge Moorman. While the latter made no express findings of fact, in reducing the amount directed by the Referee to be turned over, he necessarily differed with the Referee's findings, and that, too, although he heard no additional testimony. We shall assume, however, that he found the bankrupt then to have the $8,000 in his possession or control. The turnover order, together with the findings on which it was based, was in no sense final; it was but an interlocutory step in the administration of the estate, and as such within the discretionary power of the Court to rehear, reconsider, and change at any time while the bankruptcy proceedings were pending. In substance, though not in form, Judge Dawson granted such a rehearing, and on the same evidence, supplemented by other evidence, reached a conclusion contrary to that of Judge Moorman as to the bankrupt's ability to pay over $8,000, or any part thereof.

(5) What this additional evidence was is not apparent from the record; we must therefore assume that, with the earlier testimony, it supported the second finding, for clearly, if a rehearing was proper, additional testimony could be taken thereon. But, even without it, we could not hold that there was no substantial evidence before the Referee to sustain this new finding.

The petition to revise must therefore be denied."

F.

The seventh point of respondent's brief, page 24, is not confined to the issue involved.

The turnover order is not involved in this appeal. The petitioner contends that the turnover proceedings and the contempt proceedings are separate and distinct. In the turnover proceedings the inquiry is whether the bankrupt has failed to turn over to the receiver or trustee properties and moneys belonging to the estate; and that in the contempt proceedings where the issue of imprisonment is involved, the inquiry is whether the bankrupt has failed to comply with the turnover order, whether he has the present ability to do so, and the degree of proof necessary in contempt proceedings—and that the two proceedings are not consistent and that different degrees of proof are involved.

Free v. *Shapiro, supra;*
In re Walt, 17 Fed. (2nd) 588;
Cases cited in petitioner's brief.

G.

In the third point of petitioner's brief, page 8, and cases cited thereunder, the contentions of counsel in respondent's eighth point, page 35, are answered. Additional authorities in support of petitioner's contention on this point are:

First Circuit— *In re Cole*, 148 Fed. 295;
Third Circuit— *In re Nicrason*, 182 Fed. 912;
Fourth Circuit— *In re Switzer*, 140 Fed. 977;
Free v. *Shapiro*, 5 Fed. (2nd), 578, C. C. A.;

Fifth Circuit—	*In re Schaefer*, 119 Fed. 1010; *Walnut Creek Milling Co.* v. *Grain Products Co.* (D. C. La.), 21 Fed. (2nd) 380; *In re Mize*, 172 Fed. 946; *In re Goldfarb*, 131 Fed. 643;
Sixth Circuit—	*In re Adler*, 129 Fed. 502;
Seventh Circuit—	*In re Gerstel*, 123 Fed. 166;
Ninth Circuit—	*In re Gottardi*, 114 Fed. 328; *Power* v. *Furman* (C. C. A.), 220 Fed. 787.

II.

In reply to the ninth point of the respondent's brief, page 37, that this is not a case which the Court might examine *de novo*, the petitioner contends that when the motion was made to punish him for contempt, he made application to adduce additional evidence to exonerate his position in compliance with the rule in *In re Weber*, *supra*.

I.

Respondent's tenth point, page 41, is:

> "Whatever the rule may be, the turnover order in this case must be presumed to have been based upon a finding that the proof of concealment and failure to turn over the property and money was beyond a reasonable doubt."

Neither the discussion under this point nor the cases cited thereunder, have any bearing on this contention.

The trustee's case was based almost entirely upon the report of an accountant (R. 22) and upon this the

Referee based his findings that the petitioner should turn over to the estate property and moneys. It is upon these findings that the respondent now seeks to have the petitioner adjudged in contempt without allowing him the opportunity to introduce evidence explaining his inability to comply.

In re Jaffee, 14 Fed. (2d) 558, the Court in discussing cases made up from accountants' testimony, said:

> "It is sometimes said that the mathematical computations can apparently prove almost anything; but conclusions, based largely upon the opinions and deductions of expert accountants are highly speculative and of doubtful value in absence of evidence of probative force."

To the same effect:

In re Magen, 18 Fed. (2d), 288.

The mere fact that the Referee's opinion was that the bankrupt had property belonging to the estate in his possession or under his control, is no indication of the quantum or degree of proof adduced on which he bases his findings.

Davidson v. *Wilson*, 286 Fed. 108 (C. C. A., 3rd Cir.) and in the case of *In re Shulman*, 177 Fed. 191 (C. C. A., 2nd Cir.) cited by the respondent in support of his contentions under this point, deal only with the proposition that the report of the Referee affirmed by the District Court should not be disturbed unless plain mistake had been made.

These cases in nowise support the respondent's con-

tention that the turnover order must be presumed to have been based upon the finding that the failure to turn over was beyond a reasonable doubt.

J.

Respondent states his thirteenth point (p. 77), that unless the bankrupt is punished for contempt upon his failure to comply with the turnover order, turnover orders would be useless except for the word 'unless'.

This point is irrelevant in these considerations. The question involved is the degree of proof necessary to show that the bankrupt has present possession and control of the property or money belonging to his estate and his ability to comply with the order.

Rose, *J.*, in *Kirsner* v. *Taliaferro* (*supra*), said:

> "We thoroughly agree with those courts which hold that, before a bankrupt may be committed for failure to obey an order to turn over property to his trustee, the court should be satisfied that he has present ability to comply. For many reasons the conviction that he has the power should be as nearly absolute as human conclusions ordinarily can be. We know no better way of stating the quantum of proof which should be insisted on than to say, as other courts have said, that it should be sufficient to establish the fact beyond reasonable doubt. Such a rule is required, not only for the protection of the liberty of the citizen, but for the preservation of the dignity of the court itself. It is not well that there should be many occasions in which, after sending a man to jail for refusing to obey an order, the Court will feel constrained to release him without the order

being obeyed. Unless the power of commitment as a means of compulsion is exercised only when there is no real question of the ability of the defendant to do what he is commanded, such an outcome will not be uncommon."

This Court said in *California Paving Co.* v. *Molitor*, 113 U. S. 609, 5 Supp. Ct. Rep. 618, 28 L. Ed. 1106:

"Process of contempt is a severe remedy, and should not be resorted to where there is a fair ground of doubt as to the wrongfulness of the defendant's conduct."

"The genius of our law requires the guilty should escape rather than an innocent man shall suffer imprisonment."

In re J. A. Small Shoe Co., 13 Fed. (2d) 143 (D. C., Conn.), at page 145.

Respectfully submitted,

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